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October 4, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
CY-B402
445 Twelfth Street, S.W.
Washington., DC 20554

Re: Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding pursuant to the Commission's August 20, 2001 Public Notice Requesting Comments are an original, two paper copies, and a diskette copy of the Reply Comments of El Paso Networks, LLC and PacWest Telecom, Inc.

Please date stamp and return the enclosed extra copy of this filing in the self-addressed, postage prepaid envelope provided. Should you have any questions concerning this filing, please do not hesitate to call us.

Respectfully submitted,

Harisha J. Bastiampillai

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by SBC Communications, Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 01-194
Southwestern Bell Communications Services, Inc.	)	
d/b/a Southwestern Bell Long Distance for	)	
Provision of In-Region, InterLATA Services in	)	
Arkansas and Missouri	)	

REPLY COMMENTS OF EL PASO NETWORKS, LLC AND PACWEST TELECOMM, INC.

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Dated: October 4, 2001

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SUMMARY

SBC asks for this Commission to embark on a series of presumptions. First, it asks that the Commission take rates, terms and conditions, and in some cases, even performance data imported from other states as a surrogate for competitive checklist compliance in Arkansas and Missouri. Second, it asks that this purported "checklist compliance" be treated as a strong presumption that its applications are in the public interest. This "short cut" approach to Section 271 approval begs the question of whether there is actual local competition in Arkansas and Missouri. The reality of the local exchange markets in Arkansas and Missouri demonstrates that local competition in those states is anemic and prospects for future competition are dim.

It is little wonder then, given the lack of local competition in Arkansas and Missouri, that these applications have elicited numerous comments echoing the Commenters call for a rigorous and viable public interest analysis for these applications. Such an approach would be in line with the sentiments for a more potent public interest analysis demonstrated in the letter from Senators Burns, Hollings, Inouye, and Stevens to Chairman Powell. The Commission does not need to craft this analysis from scratch, it just needs to remain true to its initial articulation of the public interest standard. Under such an approach, the Commission will apply its public interest analysis separate from its considerations of checklist compliance, and will look at the state of local competition in the particular markets first before looking at the impact on competition in long distance markets. The Commission would ask if the local markets in Arkansas and Missouri are "fully and irreversibly" open to competition.

The record of this proceeding, and the proceeding evaluating SBC's first application in Missouri, demonstrates that significant barriers to competition remain particularly in the form of pricing in Arkansas and Missouri. In Arkansas, competitors have had to endure high prices,

particularly high nonrecurring charges, which have impeded competitive entry. What is worse, the Arkansas PSC is statutorily proscribed from taking the necessary actions to ensure cost-based pricing in Arkansas, both now and in the future. In Missouri, high prices, and an excessive number of interim rates, have chilled competitive entry, especially for carriers that rely on high-capacity facilities. SBC asks the Commission to allow it to incorporate Kansas rates into Arkansas based on a cost comparison between the two states, but asks the Commission to ignore the fact that the same cost comparison demonstrates that Missouri's prices should be much lower than they are.

The sad reality in Arkansas and Missouri is that competitors are exiting from these markets rather than entering, and citing SBC's high prices as the cause of their exit. The prospects for the future are not any brighter, as SBC is already seeking higher rates, and history has borne out that the promise of lower rates in the mega-interconnection agreements turns out to be quite illusory. In addition, SBC is impeding the implementation of vital performance metrics and self-executing payments that are crucial to assuring future compliance. In Arkansas, there is little hope for future compliance given the Arkansas PSC's self-characterization of its limited authority to police SBC's performance.

The competitive divide in Arkansas and Missouri will become very pronounced in regard to advanced services as SBC races ahead with its deployment of advanced services, but plays shell games with its affiliate structure in an attempt to evade its Section 251(c) obligations. While SBC unabashedly offers numerous advanced services through its web site and other marketing materials, competitors are impeded in their ability to access the necessary facilities to provide competitive services at parity. The Commission should ensure that SBC meets its Section 251(c) obligations as established by the U.S. Court of Appeals for the D.C. Circuit in

ASCENT v. FCC. SBC's request to the Commission that the Commission limit competitive access to its advanced services facilities despite the unequivocal language of *ASCENT* demonstrates that the Commission be extra-vigilant on this issue. The Commission must make certain that SBC is not avoiding its Section 251(c) obligations through its affiliate structure.

Granting these applications would undermine both the letter and spirit of the public interest standard. SBC asks the Commission to rely on its promises of future performance, but these promises are belied by the history of the local markets in Arkansas and Missouri. For years, SBC stifled local competition in these states and now attempts to rely on last-minute price reductions and incorporation of terms and conditions from other states to garner Section 271 authority. This approach is not a recipe for true competition and the effects of such an approach is seen in the limited state of competition in both states. The Commission should not endorse such an approach.

The public interest standard was designed to prevent a return to the pre-divestiture telecom market where the incumbent carrier could leverage its monopoly control over the local market to stifle competition. The news that AT&T, a major presence in both the Arkansas and Missouri markets, is open to merger discussions with RBOCs, is troubling in many aspects. One, it signals that the prospects for long-term competition in Arkansas and Missouri in both the local and long distance markets is even bleaker than before. Two, the idea of AT&T merging with a BOC that was once "unthinkable" is now more probable, and suggests that instead of seeing the development of more competition, we are witnessing a regression to the pre-divestiture period. This is not what Congress intended in drafting the 1996 Act, nor what the Commission sought in implementing the Act. A viable public interest standard needs to be reestablished to put competition back on track.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by SBC Communications, Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket No. 01-194
Southwestern Bell Communications Services, Inc.	)	
d/b/a Southwestern Bell Long Distance for	)	
Provision of In-Region, InterLATA Services in	)	
Arkansas and Missouri	)	

REPLY COMMENTS OF EL PASO NETWORKS, LLC AND PACWEST TELECOMM, INC.

El Paso Networks, LLC ("El Paso") and PacWest Telecomm, Inc. ("PacWest") ("Commenters") submit these reply comments concerning the above-captioned Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance ("SBC") for Provision of In-Region, InterLATA Services in Arkansas and Missouri filed August 20, 2001 ("Application").[1] For the reasons stated herein, and in their initial Comments, the Federal Communications Commission ("Commission") should deny the Application.

I. THE COMMISSION SHOULD REESTABLISH THE PUBLIC INTEREST STANDARD AS A SEPARATE AND VIABLE STANDARD

A. A Viable Public Interest Standard Is Necessary To Assure Competition

Since SBC's first application for Section 271 authority in Missouri, the Commenters have urged the application of a viable public interest analysis to SBC's request for long distance authority in the state. The inclusion of Arkansas into SBC's application only heightens the need

for a stronger public interest analysis. In both states, local competition, particularly in the residential market, is at anemic levels, and the prospects for such competition are not bright. CLECs are either exiting those markets, or deciding not to enter the markets, because the factors necessary for competition to take root are not present.[2]

The Commenters are not a lone voice in this call for a more viable public interest standard. The call for a more stringent application by the Commission of public interest standard was recently echoed by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.[3] In that letter the Senators stated:

> [t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.[4]

The public interest argument is a central one in the appeal of this Commission's Order granting Section 271 authority in Kansas and Oklahoma.[5] Commissioner Copps recently emphasized that

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[1] Comments Requested on the Joint Application By SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Arkansas and Missouri, Public Notice, CC Docket No. 01-194, DA 01-1952, released August 20, 2001.

[2] AT&T provides a very sobering review of the state of local competition in both states. Many of the CLECs that SWBT identifies as competitors in those states have "gone, or are going out, of business or are otherwise in financial distress at the present time." Over a dozen CLECs in Missouri have surrendered their certificates of public convenience and necessity just in the past year. CC Docket No. 01-194, Comments of AT&T Corp. at 93-94 (September 10, 2001)("*AT&T Comments*"). Even viable CLECs are having to scale back their operations. McLeod, another major presence in the Arkansas and Missouri markets, announced yesterday that it is abandoning its national expansion plans and scaling back capital expenditures. *McLeodUSA Announces Focused Strategy for Future Growth, Abandons National Network, Identifies Non-Strategic Assets for Sale, Maintains Fully Funded Plan*, Press Release (October 3, 2001).

[3] Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) ("*Senators' Letter*").

[4] *Id.* at 3.

[5] Edie Herman, *Appeals Court Reviews FCC's Sec. 271 Order for Kan. And Okla.*, Communications Daily, Vol. 21, No. 181 at 3-4 (Sept. 18, 2001)("[Judge] Silberman asked [David] Carpenter [counsel for AT&T] to state 'his strongest argument' and Carpenter responded that it was FCC's 'failure to consider the public interest' in dismissing competitive impact arguments.").

"we must not forget that the granting of an application must be in the public interest" and that "continued BOC dominance of a state's local market, however, could undermine consumer benefits if the BOC could leverage this dominance upon entering the interLATA market."[6]

The Commission does not need to craft a new public interest standard; it can merely apply the public interest standard it initially set in the first round of Section 271 applications.[7] Central to the Commission's analysis has to be whether the markets in Arkansas and Missouri are "fully and irreversibly open to competition."[8] The Commission has stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[9] As the Department of Justice notes, in-region, interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[10] The Department of Justice has noted that:

> [t]his standard seeks to measure whether the barriers to competition that Congress sought to eliminate with the 1996 Act have in fact been fully eliminated and whether there are objective criteria to ensure that competing local exchange carriers ("CLECs") will continue to have nondiscriminatory access to the facilities and services they will need from the BOC in order to enter and compete in the local exchange market.[11]

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[6] *Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Dissenting Opinion of Commissioner Michael J. Copps at 1 (September 19, 2001).

[7] *See* discussion of the Commission's initial conceptualization of the public interest standard in CC Docket No. 01-194, Comments of El Paso Networks, LLC and PacWest Telecom, Inc. at 4-6 (September 10, 2001)("*El Paso/PacWest Comments*").

[8] *See, In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 386 (1997) ("*Ameritech Michigan 271 Order*").

[9] *Id.*

[10] CC Docket No. 01-194, Evaluation of the United States Department of Justice at 2 (September 24, 2001)("*DoJ Evaluation*"); *see also, Ameritech Michigan 271 Order* at ¶ 382.

[11] *DoJ Evaluation* at 2.

In addition to Commenters, numerous parties have stated that SBC fails to meet this standard for its current applications.[12] The Commission has traditionally focused on both the current state of competition in a particular market and assurances of future compliance to ensure future competition in evaluating the public interest standard.[13] In both these areas, SBC's application is lacking.

B. The Current State of Local Competition

SBC would urge the Commission to skip this stage of the analysis because "the benefits of new entry long distance *presumptively* outweigh any risk of harm."[14] It is easy to see why SBC would want the Commission to overlook the current state of local competition because competition is anemic in both Arkansas and Missouri. Less than 1% of residential lines in SWBT's Arkansas service territory are served by facilities-based competitors and less than 1% are served by UNE-based competitors.[15] In Missouri, less that 2% of the residential lines are served by facilities-based competitors and only 1/10 of 1% of such lines are served by UNE-based competitors.[16] Facilities-based competition in both states had reached a plateau in the first half of 2001 and the indications are that market shares are decreasing due to CLEC financial

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[12] *AT&T Comments* at 87-109; CC Docket No. 01-194, Comments of Sprint Communications Company, L.P. at 12-18 (September 10, 2001)("*Sprint Comments*"); CC Docket No. 01-194, Comments of City Utilities of Springfield, Missouri at 7-11 (September 10, 2001)("*City Utilities Comments*"); CC Docket No. 01-194, Comments of the Missouri Office of Public Counsel Comments at 9 (September 10, 2001) ("*MO Office of Public Counsel*").

[13] *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, ¶¶ 266-281 (Jan. 22, 2001) ("*SWBT KS/OK 271 Order*").

[14] *AT&T Comments* at 89, *quoting*, SBC Application at 145 (emphasis in original). AT&T notes that the Commission has unequivocally rejected such a presumption. *AT&T Comments* at 89; *see also, Ameritech Michigan 271 Order* at ¶ 386 ("We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.")

[15] *AT&T Comments* at 92.

[16] *Id.*

difficulties.[17] Likewise, the prospects for UNE-based competition are equally bleak. AT&T observes that "the current level of UNE-based competition for residential service in SWBT's Arkansas and Missouri service territory is about 1-3% of the levels of UNE-based residential competition that existed in New York and Texas at the time the Commission considered § 271 applications for those states."[18]

These findings have been supported by other carriers as well.[19] The Missouri Office of Public Counsel noted:

> [A] case is now pending at the MO PSC on the status of competition, not only for local exchange service in SWBT's territory, but for all telecommunications services in each SWBT exchange. According to the testimony filed to date, the outlook for real and effective competition in the local market is not good. *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*, TO-2001-467. The evidence strongly suggests that there is an absence of effective competition in the local exchanges of SWBT in the state.[20]

While the Commission has not required a BOC to show a loss of a specific percentage of its market share, it has found data on the "nature and extent to actual local competition" to be relevant to its public interest inquiry.[21] If there is a lack of competitive entry then the Commission will examine if this lack of entry is due to "the BOC's failure to cooperate in

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[17] *Id.* at 93-94.

[18] *Id.* at 96.

[19] CC Docket No. 01-194, Comments of WorldCom at 13 (September 10, 2001)("*WorldCom Comments*")("In neither Arkansas nor Missouri is there currently any local residential facilities-based competition to speak of, and there is no indication that any is on the way."); *DoJ Evaluation* at 5 (Noting lack of CLEC penetration in Arkansas residential market and also lack of DSL entry); CC Docket No. 01-88, Evaluation of Department of Justice at 6-7 (May 9, 2001) ("*DoJ MO Evaluation*") (Noting "significantly less" residential competition, low UNE-based competition and low DSL entry in Missouri); *Sprint Comments* at 2 (Observing lack of facilities-based competition in Arkansas); CC Docket No. 01-194, Comments of Navigator Telecommunications, LLC at 2 ("SWBT has not demonstrated the existence of local competition in Arkansas sufficient to justify SWBT's entry into the interLATA long distance market at this time.")

[20] *MO Office of Public Counsel Comments* at 8.

[21] *Ameritech Michigan 271 Order* at ¶ 391.

opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason."[22]

There are numerous factors that have contributed to the lack of competitive entry in the Arkansas and Missouri markets and the evidence "makes clear that entry barriers and SWBT's own actions have perpetuated SWBT's monopoly . . . ."[23] The Commenters have shown how the high and interim nature of UNE rates in Missouri and high rates in Arkansas, coupled with a lack of state commission review of those rates, has impeded the development of competition.[24] Numerous parties have commented on the high rates and their impact on competition. As the Department of Justice noted, "the low levels of CLEC penetration of residential markets in Arkansas, and in particular, the lack of use of the UNE-platform, may reflect higher UNE pricing in effect during most of the period preceding this application as opposed to the UNE prices on which SBC rests this application."[25] In Missouri, the Department of Justice noted that the effect of the high and largely interim rates is seen in the lack of UNE-based competition, and that the pricing issues were giving rise to doubts that the market is open to competition.[26] This illustrates a point that Commenters raised in their initial comments as to how disconnected the competitive checklist has become from the nature of actual competition in a particular state. For years, SBC imposed exorbitant non-TELRIC compliant prices in Arkansas (and in Missouri as well).[27] SBC then imposes last-minute price reductions and argues that it is in "compliance" with the

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22 *Id.*

23 *AT&T Comments* at 97.

24 *El Paso/PacWest Comments* at 15-20.

25 *DoJ Evaluation* at 6.

26 *DoJ MO Evaluation* at 6, 19.

27 *El Paso/PacWest Comments* at 14-20.

checklist. As McLeodUSA notes, "SBC presented no evidence to the MPSC that the new rates are the appropriate rates . . . ."[28] Commissioner Gaw of the Missouri PSC observed:

> This Commission has heard no evidence as to the appropriateness of these rates as of the date of this order [August 30, 2001]. It can only say that the rates are lower and thus deductively better for competition than rates approved in a previous case.[29]

As AT&T astutely observes, this is a situation where a "finding of checklist compliance is not dispositive of the public interest."[30] The fact "that UNE prices have been set within the 'range' that the Commission has held to be acceptable for determining rates are cost-based does not answer the question whether UNE rates are sufficiently low to permit substantial and irreversible UNE-based competition."[31] This is particularly the case when the purported "cost-based" rates have been implemented just prior to the filing of the application.

ALLTEL and Navigator have "withdrawn from facilities-based competition" in Arkansas due to the high costs imposed by SWBT.[32] Navigator notes that its attempts to provide UNE-based residential service in Arkansas was thwarted by SWBT's imposition of excessive non-recurring costs."[33] The situation has been exacerbated by the great deal of uncertainty regarding UNE rates in both Arkansas and Missouri. As AT&T observes:

> Uncertainty in UNE-rates – the largest single input to the cost of local entry – severely compromises the ability of a CLEC to execute a business plan. Competitive entry in Missouri has been plagued by precisely this sort of

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[28] CC Docket No. 01-194, Comments of McLeodUSA at 11 (September 10, 2001) ("*McLeodUSA Comments*").

[29] *Id., quoting,* MO PSC Case No. TO-99-227, Concurring Opinion of Commissioner Gaw at 1 (August 30, 2001).

[30] *AT&T Comments* at 98.

[31] *Id.*

[32] *Sprint Comments* at 9; *see also*, AT&T Comments at 99 ("The APSC has similarly noted that uncertainty about SWBT's UNE prices – and whether the APSC even had the authority to set such prices – were the key factors in the withdrawal from the residential market of ALLTEL.")

[33] *Navigator Comments* at 4.

> uncertainty. The APSC has similarly noted that uncertainty about SWBT's UNE prices – and whether the APSC even had the authority to set such prices – were the key factors in the withdrawal from the residential market of ALLTEL, the only facilities-based provider of residential services in Arkansas at the time.[34]

As Sprint queries:

> Is it really surprising that there is no facilities-based competition in Arkansas given the PSC's lack of legal authority to ensure the reasonable availability of UNEs and interconnection? Can anyone doubt that there is a direct causal relationship here?[35]

As Commenters noted in their initial comments, it is this very combination of high UNE rates coupled with the uncertainty surrounding those rates that is keeping CLECs like the Commenters out of the Arkansas and Missouri market.[36] As Sprint observes:

> To the extent that competitors reasonably believe that the Missouri PSC will adopt above-cost rates (*i.e.*, those proposed by SWBT), the use of interim rates cannot dispel the uncertainty and risk of entry.[37]

The interim nature of the rates has a "chilling effect" on competitive entry by precluding CLECs from developing a rational business plan for market entry in the state.[38] In Missouri, "where CLECs cannot reasonably estimate the costs they will face, they cannot risk committing scarce financial resources to enter on any significant scale."[39]

There have also been anticompetitive actions on the part of SBC that have prevented the development of viable competition. As the Missouri Office of Public Counsel notes:

> Public Counsel suggests that the public interest standard is not satisfied in this application. As time passes, the ability for effective competition in the local exchange market in SWBT's territory seems to grow dimmer. SWBT placed

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[34] *AT&T Comments* at 99.

[35] *Sprint Comments* at 17.

[36] *El Paso/PacWest Comments* at 8.

[37] *Sprint Comments* at 26.

[38] *Id.* at 27.

[39] *Id.*

> obstacles in the path of effective competition by forcing CLECs to engage in a two year struggle to gain the ability to offer the PSC's Optional Metropolitan Calling Area Plan to CLEC customers on the same basis as SWBT offers the plan to its customers. SWBT impeded competition by failing to follow PSC directives making its Local Plus IntraLATA wide flat rated plan available for resale to CLECs and IXC until again ordered to do so by the PSC.[40]

SBC has also impeded the competitive deployment of advanced services which will be discussed in more detail below. The Missouri Office of Public Counsel has noted that even in the business market, "competition for local business customers, to the extent it exists at all, lies primarily with the high-end volume user in the central zones of the St. Louis and Kansas City metropolitan areas."[41] Likewise, City Utilities of Springfield, Missouri notes that competition is concentrated in St. Louis and Kansas City and there is very little competition in small communities or rural areas of Missouri.[42] City Utilities notes that a major reason competition has failed to develop in these areas is SBC's "vigorous sponsorship and advocacy" of a bill that prohibited Missouri's "municipalities and municipal electrical utilities from providing or facilitating the provision of competitive telecommunications services in their communities."[43] SBC is clearly seeking to limit competition, and not promote it.

C. Ensuring Future Compliance

The Commission has stated that one factor it will consider as part of its public interest analysis is whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market.[44] The Commission has stated that the fact that "a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative

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[40] *MO Office of Public Counsel Comments* at 8.

[41] *Id.* at 9.

[42] *City Utilities Comments* at 7.

[43] *Id.* at i.

[44] *SBC KS/OK 271 Order* at ¶ 269.

evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest."[45]

The Commission has noted that performance monitoring serves the following key purposes:

> First, it provides a mechanism by which to gauge a BOC's present compliance with its obligation to provide access and interconnection to new entrants in a nondiscriminatory manner. Second, performance monitoring establishes a benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service once a BOC is authorized to enter the in-region, interLATA services market.[46]

El Paso noted in the initial comments how it asked that SBC implement metrics to track DS-3 and dark fiber provisioning, but SBC has refused to do so. As a result, significant failures in provisioning of these UNEs fail to show up in the performance data.[47] The lack of applicable performance measures has palpable effects on the ability of CLECs to receive service at parity. For instance, nearly 50% of El Paso's dark fiber orders for the first phase of its installation in Houston did not work correctly and El Paso needed to open trouble tickets on the orders. These failures are not reflected in performance statistics since SBC refuses to track its dark fiber provisioning. Thus, SBC can claim its provisioning dark fiber on a nondiscriminatory basis since it eliminates any evidence of its nonperformance.

This difficulty in establishing new metrics is corroborated by AT&T. AT&T notes that when the Public Utility Commission of Texas Staff sought to implement DSL-related performance measurements, something which this Commission fully expected would occur when it granted SBC 271 authority in Texas, SBC spurned the request stating that "the Performance

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[45] *Id.*

[46] *Ameritech Michigan 271 Order* at ¶ 393.

[47] *El Paso/PacWest Comments* at 11.

Remedy Plan cannot be changed without the mutual consent of the parties . . . [and that it] is not amenable to changes in the plan based on its current level of performance."[48] AT&T also chronicles SWBT's challenges to measures and remedies ordered by the TPUC Staff. As AT&T observes:

> Noting that certain aspects of the TPUC's order were 'regrettably unacceptable,' SWBT argued that the changes to the measures and remedies ordered by the TPUC were of 'no benefit to CLECs or to the public.' Notably, among the directives that SWBT found 'unacceptable' and 'of no benefit' to CLECs' were requirements that SWBT implement new special access performance measures, institute a sampling methodology regarding the adequacy of its loop qualification database, and pay liquidated damages for failing to comply with business rules and violating performance standards for its flow-through measure.[49]

Not only is SBC's intransigence troubling in regard to considerations of the ability to ensure future compliance with section 271 standards, it provides quite an insight into the failure of SBC to meet such standards today. The lack of competition in the advanced services market and problems with SBC's flow-through performance clearly are not coincidental given SBC's opposition to viable performance standards in these areas.

In Arkansas, the situation is particularly troublesome given AR PSC's characterization of its "limited legal authority to ensure future performance."[50] Thus, even if the Commission finds the level of competition in Arkansas to be minimally adequate, there is no assurance that the market will remain open. As the Department of Justice stated:

> There is, however, cause for concern about the enforcement of the PRP in Arkansas because the Arkansas Public Service Commission ("PSC") has stated that it has only "limited authority to ensure future performance." This apparent limitation is problematic for two reasons. First, for maximum effectiveness a post-entry performance plan should have a mechanism for modification in response to changes in the telecommunications industry and in the local market.

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[48] *AT&T Comments* at 57.

[49] *Id.* at 58.

[50] *Second AR PSC Consultation Report* at 12.

> Although the Texas PUC has taken the lead within the five-state Southwestern Bell region in reviewing and modifying the Texas PRP during its six-month review process, it is unclear whether or how these changes will be incorporated into the Arkansas PRP. Second, although SBC asserts that enforcement by the Arkansas PSC will not be needed, it is unclear whether the PRP is adequately self-enforcing, i.e., whether SBC will automatically make payments if its wholesale performance falls to a statistically significant level of disparity.[51]

AT&T has chronicled in detail the difficulties it has obtaining penalty payments and that the Texas remedy plan has "not generated payments that are automatically triggered by noncompliance with the applicable performance standards."[52] AT&T notes that SWBT impermissibly withheld liquidated damages to which AT&T was entitled, and that AT&T was forced to file a complaint with the Texas PUC. Clearly CLECs in Missouri and Arkansas can expect the same difficulties since these Performance Remedy Plans track the Texas one. In Arkansas, there will be no way to police SBC's compliance because the "PSC's hands are tied by state law, preventing it from ensuring future compliance."[53] As Sprint concludes, "without state post-entry enforcement of the performance assurance plan and continued compliance with the market opening provisions of the Act, the miniscule amount of competition that exists in Arkansas today will not survive."[54]

The record of this proceeding clearly demonstrates that the local markets in Arkansas and Missouri are not "fully and irreversibly" open to competition.

D. Application of a Viable Public Interest Standard To This Application

The public interest standard as initially conceived by Congress, and as implemented by this Commission, was intended to be a viable and independent consideration from that of

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[51] *DoJ Evaluation* at 13.

[52] *AT&T Comments* at 54.

[53] *Sprint Comments* at 15.

[54] *Id.* at 17.

compliance with the checklist, was intended to consider the state of local competition in a particular state before looking at the impact that Section 271 authority would have on the long distance market, and ultimately was designed to consider whether considering the totality of the circumstances the public would benefit from the grant of the application.[55]

SBC in this application is attempting to turn the public interest standard into a mere shell of what it is supposed to be. SBC in its application stresses that checklist compliance creates a strong presumption that the public interest standard is met. The Missouri Public Service Commission appeared to share the same opinion in the hearings it conducted on SBC's application.[56] SBC also asks the Commission to look at the benefits Section 271 authority would give to the long distance market without considering what the state of local competition is in the Arkansas and Missouri markets.

The evidence is unequivocal in this application that local competition, particularly in the residential area, in the Arkansas and Missouri markets is anemic and whatever competition there is imperiled. SBC bases its case for checklist compliance not on the history of the post-1996 Arkansas or Missouri local markets or any strides it has made to develop competition in these markets. Instead it bases it case primarily on mega-interconnection agreements which rely on terms, conditions and prices incorporated from other states. It is very telling that both the Arkansas and Missouri commissions were poised to reject SBC's applications based on findings of checklist noncompliance but granted authority based on changes SBC made to its M2A and A2A. These agreements were prospective in nature and contingent on the state commissions endorsing their Section 271 applications. It is hard to see how such modifications could

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[55] *El Paso/PacWest Comments* at 2-6.

[56] *See McLeodUSA Comments* at 22-23.

demonstrate that SBC is currently meeting checklist requirements, or had been for the period preceding its application.[57] The fact that SBC had to lower substantially its rates in both Arkansas and Missouri prior to filing this application shows how long competitors have had to endure exorbitant rates in both states. This demonstrates how disconnected the checklist has become from the state of actual local competition in a particular state.

If the M2A and A2A are designed to make up for years of lack of local competition in the Arkansas and Missouri markets, then they should be allowed to operate and demonstrate that they will promote competition.[58] As the Missouri Office of Public Counsel perceptively comments:

> The FCC should act with deliberation and based on a full and complete record made at the MO PSC with the opportunity for all parties to test the evidence. The FCC should demand that a clear and convincing justification for discrimination in the treatment of Missouri CLECs and Missouri consumers as compared to neighboring states. Public Counsel does not believe such a justification can be made. Finally, the FCC needs to take a hard look at the status of competition in Missouri, not just the compliance with the 14 point checklist, to weigh the detrimental impact approval of this application will have on the public interest by allowing premature entry of SWBT into the interLATA long distance market while it holds a virtual monopoly in local exchange service.[59]

The danger of a premature grant of Section 271 authority in theses states would be to diminish further the prospects of local competition and allow SBC to leverage its local monopoly market power in the long distance area. AT&T provides a very cautionary tale. AT&T notes how the Public Utility Commission of Texas filed a report earlier this year on the state of local competition in Texas. As AT&T chronicles:

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[57] *See Id.* at 24.

[58] For instance, McLeodUSA notes that after years of resistance SBC has agreed to pro-competitive terms and conditions for collocation. Yet, as McLeodUSA notes, "as promising as SBC's new collocation tariff is, however, the fact remains that SBC cannot yet demonstrate a track record in Missouri of compliance with the 271 requirements concerning collocation." MCLeodUSA adds that the new tariff "cannot erase overnight years of poor collocation performance by SBC." *McLeodUSA Comments* at 14.

> The *TPUC Report* makes clear that even today, a year after obtaining 271 authorization in Texas, SWBT retains monopoly control of the residential local market in Texas and has raised prices for local service. CLEC competition for residential customers, while initially active, has faded, as experience has demonstrated that entry into local residential markets is not profitable. This lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and having established its market power, to raise its price for long distance service. If SWBT were now to receive interLATA authorization in Arkansas and Missouri, where UNE-and facilities-based competition has yet to develop at all, the anticompetitive results for consumers of both local and long distance service would materialize much faster and be far worse.[60]

The Commission must ask itself if granting these applications is truly in the public interest. Are the consumers in Arkansas and Missouri served by SBC impeding competition in Arkansas and Missouri for five years, and then at the last minute introducing lower prices and less draconian terms and conditions of interconnection? Granting these applications will only exacerbate the trend of RBOCs to delay the implementation of local competition as much as possible in a particular state and then implement last-minute measures to support its application.[61] This is surely not the result that Congress intended in drafting Section 271. Customers in Arkansas and Missouri will not be served by higher prices for both local and long distance service that a bundled monopoly in both the local and long distance markets will bring. Granting a premature grant of Section 271 authority in these two states would seem to defeat the goals that the public interest standard was designed to promote.

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[59] *MO Office of Public Counsel Comments* at 9-10.

[60] *AT&T Comments* at 88-89.

[61] *See also, McLeodUSA Comments* at 18.

II. PRICING IN MISSOURI AND ARKANSAS DOES NOT COMPLY WITH CHECKLIST ITEM 2

A. Missouri

Commenters noted in their initial Comments their concerns about SBC's pricing for UNEs, particularly high-capacity UNEs.[62] These concerns have been echoed by other parties as well. NuVox notes that monthly recurring charges for DS3 entrance facilities in the M2A is six times the corresponding T2A rate and four to five times the corresponding Arkansas/Kansas rate and the nonrecurring charges for such facilities are also significantly higher as well.[63] The Missouri recurring charges for DS1 entrance facilities are more than double the Texas, Arkansas and Kansas rates, and the nonrecurring charges for such facilities are six to thirteen times the T2A prices and three to five times the Arkansas/Kansas rates.[64] The Missouri recurring charges for DS1 to DS3 multiplexing are more than two times the Texas and Arkansas/Kansas rates, while the nonrecurring charges are 30 to 50% higher than the Texas and Arkansas/Kansas charges.[65] Multiplexing/demultiplexing and grooming that is associated with optical transport is included in the optical interoffice Dedicated Transport price. Stand-alone use of optical

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[62] *El Paso/PacWest Comments* at 18-19.

[63] CC Docket No. 01-194, Comments of NuVox, Inc. at 4 (September 10, 2001) ("*NuVox Comments*"). The monthly recurring charge ("MRC") for DS3 entrance facilities in Missouri is $1,884.49 in all density zones, while the MRC in Texas is $286.29/$458.44 (urban/suburban), and the MRC in Arkansas/Kansas is $362.87/$458.44 (urban/suburban). The nonrecurring charges ("NRC") in Missouri are $477.75/$372.00 (initial/additional), the NRC in Texas is $395.59/$175.57 in Texas (initial/additional), and the NRC in Arkansas/Kansas is $260.45/$107.45 (initial/additional).

[64] *Id.* The MRC for DS1 entrance facilities in Missouri is $162.30 (all density zones) while the MRC in Texas and Arkansas/Kansas are in the $75-$77 range depending on the density zone. The NRC in Missouri is $471.00/$342 (initial/additional), the NRC in Texas is $73.25/$26.28 (initial/additional), and in Arkansas/Kansas is $165.86/$65.78 (initial/additional).

[65] *Id.* at 5. The Missouri MRC for DS1 to DS3 multiplexing is $815.00, the Texas MRC is $365.11, and the Arkansas/Kansas MRC is $359.53. The Missouri NRC is $1,029/$609.75 (initial/additional), the NRC in Texas and Arkansas/Kansas is $777.51/$439.79 (initial/additional).

multiplexing may be requested through the Special Request process.[66] Thus, if DS multiplexing charges are non-cost based it is highly likely that optical multiplexing prices are equally inflated which would impugn not only the stand-alone optical multiplexing prices, but also the optical interoffice Dedicated Transport prices.

Monthly recurring charges in Missouri for DS1 loops exceed Arkansas/Kansas prices by as much as 40% and exceed Texas prices by as much as 15 to 20%.[67] The nonrecurring charges for DS1 loops in Missouri exceed Arkansas/Kansas prices by 50% and Texas prices by 40%.[68] The Commenters are also concerned that if charges for DS1 loops are non-cost based then there is no assurance that charges for DS3 and higher capacity loops, which are provided through the Special Request process,[69] are cost-based.

To compound matters, these charges fall within the large number of charges that are interim in Missouri. These prices are "non-cost based, were approved on an 'interim basis' by the Missouri Public Service Commission in a December 1997 arbitration decision, and have been allowed to remain in effect on an 'interim basis" since that time."[70] The rates were proposed charges by SBC that the Missouri PSC adopted pending review of cost studies so they were never determined to be TELRIC-compliant.[71] CLECs urged that to ameliorate the high nature of the interim rates that Texas or Arkansas/Kansas prices should be used on an interim basis pending the Missouri PSC's determination of final prices, but SBC "steadfastly resisted" this call

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[66] *See* Attachment UNE-MO (M2A), § 8.2.1.5.2, p. 19.

[67] *Id.* at 6. The Missouri MRCs for DS1 loop range from $91.06 to $95.45 in the urban and suburban zones, in Texas the MRCs are between $75-$77, and in Arkansas/Kansas the MRCs are $64.78 and $70.26.

[68] The NRCs for DS1 loop are $102.47/$40.46 (initial/additional) in Missouri; $68.40/$27.25 (initial/additional) in Arkansas and $73.25/$26.68 (initial/additional) in Texas.

[69] *See* Attachment UNE-MO (M2A), § 4.3, p. 9.

[70] *NuVox Comments* at 6.

[71] *AT&T Comments* at 37-38.

and the Missouri PSC "inexplicably refrained" from requiring use of more palatable interim rates.[72] The hearing on setting final rates will not take place until December of this year, and there is no decision date mandated by statute or regulation in the proceeding.[73] Considering the fact that nearly four years later, CLECs are still waiting for the interim rates to be replaced, a prompt decision is not to be expected. Plus there is no guarantee that the proceeding will result in more reasonable prices since in ongoing arbitration proceedings in Missouri, SBC has been seeking much higher proposed rates than those currently in the M2A.[74]

As Commenters noted in their initial comments,[75] the Commission should place little value in initial rates proffered in these mega-interconnection agreements. The prices in SBC's multi-state agreement are significantly higher than prices in the T2A. For example, dark fiber interoffice (urban), dark fiber per strand, and dark fiber cross-connects are priced 107%, 100%, and 169% higher respectively in the generic agreement than in the T2A.[76] The Commenters are very concerned that as a practical matter CLECs will be only offered higher generic rates in the future. Therefore, the Commission should accord little weight to SBC's "2A" prices in determining Section 271 compliance.

It is somewhat ironic that these high Missouri UNE rates are being considered in concert with Arkansas UNE rates. In Arkansas, SBC has adopted Kansas rates in whole to invoke a "presumption of compliance with TELRIC if it adopted approved rates in whole and could

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[72] *NuVox Comments* at 6.

[73] *Id.*

[74] *AT&T Comments* at 38.

[75] *El Paso/PacWest Comments* at 18-19.

[76] Dark Fiber IO (Urban) – T2A price is $0.0594 compared to a generic price of $0.0123. Dark Fiber per strand – T2A price of 0.00 compared to generic price of $22.82. Dark Fiber Cross-Connect – T2A price of 1.71 compared to generic price of $4.60.

demonstrate that its costs were at or above the costs in that state whose rates it adopted."[77] By this reasoning, Missouri's rates should be very close to its rates in Kansas since the costs in those states are very close. As the Department of Justice noted:

> A comparison of USF costs for Missouri with those of Texas and Kansas, however, suggests that the difference in the tariffed prices described above exceeds any cost differences between the states. The comparison of Missouri and Kansas is particularly telling as these are adjacent states with nearly identical costs, according to the USF model. Despite this apparently close relationship, Missouri average loop rates exceed Kansas rates by 20 to 25 percent, and Missouri switch usage rates exceed those in Kansas by more than 50 percent. This significant price differential, which is greater than the apparent cost differential, compels further scrutiny of the Missouri rates.[78]

As Commissioner Gaw of the Missouri PSC noted, it is "striking . . . [that] Missouri's rates are higher than the rates just volunteered by SWBT to Arkansas – a state that is more rural and with more difficult terrain than Missouri."[79] Missouri's loop rates are, in fact, the highest in the SWBT region, even though its costs are identical to Kansas, and lower than costs in Arkansas or Oklahoma.[80] Both AT&T and WorldCom extensively detail numerous TELRIC violations in the calculation of these loop costs.[81] Likewise, Missouri's high nonrecurring charges are troubling, because Missouri's labor costs, a significant cost-driver in nonrecurring charges, is lower than those in Texas, Oklahoma or Kansas, yet the nonrecurring charges in Missouri are substantially higher.[82]

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[77] SBC Application at 12.

[78] *DoJ MO Evaluation* at 12-13.

[79] *AT&T Comments* at 42.

[80] *See WorldCom Comments* at 19; *DoJ MO Evaluation* at 13.

[81] *See AT&T Comments* at 26-28; *WorldCom Comments* at 25-27. In fact, as AT&T notes, loop costs have decreased significantly since 1996, but Missouri loop rates do not reflect this fact. *AT&T Comments* at 39.

[82] *Sprint Comments* at 24-25.

Thus competitors in Missouri are faced with high DS1 loop rates, and high and interim rates, subject to true-up, for such items as multiplexing, digital cross-connect, dedicated transport cross-connect, subloop cross-connect, dark fiber cross-connect, and dark fiber record research.[83] These products are particularly essential to carriers seeking to provide high capacity facilities to business customers. The high and interim nature of this pricing has chilled, and will continue to chill, competitive entry in the Missouri market as described above. The Department of Justice notes its concerns still remain in regard to the large number of interim rates in Missouri.[84] SBC was clearly willing to reduce some rates to bring its application in compliance with checklist item 2.[85] It is unclear why SBC did not reduce the rates discussed above to bring them into conformance with checklist item 2. As NuVox observes:

> SBC had a golden opportunity to rectify the extreme price disparities when, after having withdrawn its initial Missouri Application earlier this year, it came before the Missouri PSC and sought and received approval to modify the M2A to implement price reductions for a limited set of UNEs. However, in making those recent price adjustments SBC chose not to touch the rates for any of the TO-98-115 UNEs, and the Missouri PSC declined to grant a request by NuVox to re-open the state-level investigation and require reductions in the TO-98-115 UNE prices as a condition of the PSC's continued support of SBC's Missouri In-Region, InterLATA bid.[86]

As the Missouri Office of Public Counsel adds, "Missouri should obtain the best deal possible – parity in price with the other SWBT region states."[87] Instead, Missouri CLECs and their customers continue to get high prices that have no cost support. SBC continues to fail to meet the requirements of Checklist Item 2 in Missouri.

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[83] *See DoJ MO Evaluation* at 11, n. 38; *NuVox Comments* at 6-8.

[84] *DoJ Evaluation* at 8.

[85] SBC Application at 47-48.

[86] *NuVox Comments* at 10-11.

[87] *MO Office of Public Counsel Comments* at 7.

B. Arkansas

SBC's incorporation of its Kansas rates into Arkansas did not eliminate pricing concerns in Arkansas. AT&T noted that SBC's nonrecurring charges in Kansas "flatly violated basic forward-looking principles" resulting in rates that were as much as 100% above cost-based levels.[88] These concerns were shared by the Kansas Corporation Commission. Rather than fix the problems raised by the KCC, SWBT merely applied an across-the-board 25% rate reduction which left many of the nonrecurring charges still far above cost and out of parity with the charges in other states.[89] For instance, the Kansas nonrecurring charges for DS1 Trunk Port, Dedicated Cross Connect Voice Grade 2w, STP Port, White Page Information Zone 3, and Feature Activation Charges are from two-thirds to fifty times those in Texas.[90] The nonrecurring charges for DS1 entrance facilities in Kansas are more than twice the charges in Texas.[91]

The KCC itself noted that "NRCs should not be expected to vary significantly across SWBT's jurisdictions because the activities associated with the NRCs are expected to be very similar across the jurisdictions."[92] As AT&T astutely notes, high nonrecurring charges have a particularly adverse impact on a CLEC's ability to compete for new customers since a substantial percentage of CLEC customers are classified as "new service" customers to which nonrecurring

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[88] *AT&T Comments* at 46-48.

[89] *Id.* at 48.

[90] *Id.* The Arkansas/Kansas NRC for DS1 Trunk Port is $121.50 compared to a Texas NRC of $69.95. The Arkansas/Kansas NRC for Dedicated Transport Cross Connect Voice Grade 2W is $184.09/$150.11 (initial/additional) while the Texas NRC is $47.38/$35.00 (initial/additional). The Arkansas/Kansas NRC for STP Port is $121.66 in comparison to a Texas NRC of $50.26. The Missouri NRCs for Feature Activation Charges range from $0.05 to $1.91 while the Texas NRCs are all $0.05.

[91] *NuVox Comments* at 5, n. 13. The Arkansas/Kansas NRC for DS1 entrance facilities is $165.86/$65.78 (initial/additional) while the corresponding Texas NRCs is $73.25/$26.28 (initial/additional).

[92] *AT&T Comments* at 48.

charges would apply.[93] Thus, "SWBT's inflated NRCs ensure that its competitors incur average costs that are much higher than SWBT's own costs."[94] As Navigator noted, its "attempt to provide UNE-based residential service in Arkansas was thwarted by SWBT's imposition of excessive nonrecurring costs."[95] The Commission should ensure that these disparities in nonrecurring charges are eliminated before finding compliance with Checklist Item 2.

A more fundamental problem is that the Arkansas PSC cannot ensure that rates for UNEs and interconnection are appropriately TELRIC-based due to statutory restrictions on its authority.[96] In one arbitration, the Arkansas PSC has stated that it "has no authority to obtain information or investigate any financial information of SWBT, including cost studies to verify the accuracy of SWBT's filing."[97] What is worse is that SWBT is allowed under Arkansas law to increase or decrease its rates for telecommunications services without Arkansas PSC approval.[98] Thus, as Sprint observes, "even if the Commission finds that adopting Kansas rates in Arkansas complies with the requirements of the Act today, the Arkansas PSC apparently has no authority to ensure continued compliance in the future."[99] In Missouri, where there is state commission review of rates, SWBT has already "proposed massive rate inflation *above* the M2A permanent rate levels."[100] One can only imagine what will happen in Arkansas if SBC gets Section 271 authority. The Commission needs to ensure that TELRIC-based rates are in effect in Arkansas and will continue to be in effect prior to finding compliance with Checklist Item 2.

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93 *Id.* at 49.

94 *Id.*

95 *Navigator Comments* at 4.

96 *El Paso/PacWest Comments* at 16-17; *Sprint Comments* at 13; *AT&T Comments* at 45.

97 *Sprint Comments* at 14.

98 *Id.* at 14.

99 *Id.* at 15.

III. SBC MISUSES ITS AFFILIATE STRUCTURE IN AN ATTEMPT TO EVADE ITS OBLIGATIONS IN REGARD TO ADVANCED SERVICES

In its initial set of Comments, Commenters noted how SBC was attempting to evade its Section 251(c) requirements by playing shell games with its affiliate structure in an attempt to evade its requirement to resell DSL service.[101] The Commenters are concerned, however, that these shell games are not limited to DSL service. The deployment of other advanced services, and the facilities necessary to support such advanced services, including dark fiber, may be "hidden" in these affiliate agreements as well. For instance, SBC offers a Gigabit Ethernet service on its web site. SBC describes the product as follows:

> Gigabit Ethernet Service is a logical extension of Native LAN Services at a cost that is 70% below ATM (according to Business Communications Review). Gigabit Ethernet Service provides up to a 10 gigabit LAN/WAN extension of your customer premise equipment (CPE) gigabit switches between two locations. This transport service operates over single-mode fiber optic cables connected to fiber extender equipment located at or near your premises. Gigabit Ethernet service supports and complies with the IEEE 802.3z Ethernet LAN standard.[102]

This product is offered through SBC Global. As with SBC's relationships with other its other affiliates such as Southwestern Bell Internet Services and ASI, the precise relationship between SBC Global and SBC is unclear.[103] It is clear, however, that SBC is marketing telecommunications services which would normally be subject to Section 251(c) obligations through these entities and the Commission should ensure that SBC is not evading its obligations in the same manner that it is attempting to do with its DSL service. The Commission has held that an incumbent's unbundling obligations in regard to high-capacity transmission facilities

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[100] *AT&T Comments* at 38 (*emphasis in original*).

[101] *El Paso/PacWest Comments* at 26-29.

[102] http://global.sbc.com/content/0,4109,13,00.html#gigabit

extends to all "technically feasible capacity-related services" including "such higher capacities as evolve over time."[104] The Commission should ensure that competitors have unbundled access to such transport services such that they can provide these services at parity with SBC. If such access is not being provided, then SBC would be in violation of Checklist Item 5.

Likewise, Commenters are concerned that SBC may be transferring its available dark fiber to its affiliates for use in provision of advanced services thereby limiting the amount that is available to CLECs on an unbundled basis. Dark fiber is included within both the loop network element and the dedicated interoffice transport network element.[105] The importance of dark fiber is heightened in the SBC network architecture given the problems that commenters have documented in accessing SBC's fiber loops on an unbundled basis.[106] Since SBC posits the leasing of dark fiber as a way to allow CLECs to provide advanced services,[107] it is important that the Commission ensure that CLECs continue to receive nondiscriminatory access to all dark fiber, regardless of where SBC accounts for it in its corporate structure.

The Commission must be vigilant to guarantee that SBC does not use its affiliate structure to evade its unbundling requirements. SBC is already asking this Commission to limit competitive access to its advanced services facilities.[108] It should be remembered that the U.S. Court of Appeals for the D.C. Circuit ruling in *Association of Communications Enterprises v.*

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[103] SBC explained that ASI and SBIS are affiliates within the same corporate family and do "not necessarily reflect the strict separation between the responsibilities of a wholesale telecommunications provider and the 'consumer-oriented tasks' of a retail information service provider . . . ." *WorldCom Comments* at 9.

[104] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, ¶ 323 (November 5, 1999)("*UNE Remand Order*").

[105] *Id.* at ¶¶ 174, 326.

[106] *See AT&T Comments* at 69-76; *WorldCom Comments* at 10-12.

[107] SBC Application at 112-113.

[108] *Telecom,* Communications Daily, Vol. 21, No. 193 at 7 (October 4, 2001).

FCC[109] did not limit its ruling to resale of advanced services, but instead included all Section 251(c) obligations. The D.C. Circuit stated that "Congress did not intend for § 251(c)'s obligations to be avoided by the use of such an affiliate."[110] The D.C. Circuit observed:

> In short, the Act's structure renders implausible the notion that a wholly owned affiliate providing telecommunications services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent, should be presumed to be exempted from the duties of that ILEC parent.[111]

The Commission should continue to mandate that SBC is meeting its unbundling obligations regardless of the way it structures the distribution of its services through its numerous affiliates. Until SBC demonstrates that it is in full compliance with its unbundling requirements in regard to advanced services it cannot demonstrate that it is in compliance with Checklist Items 4 and 5 in regard to unbundled loops and transport.

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[109] No. 99-1441, 2001 WL 20519 (D.C. Cir. 2001) ("*ASCENT*")

[110] *Id.*

[111] *Id.*

IV. CONCLUSION

For the foregoing reasons, El Paso Networks, LLC and PacWest Telecomm, Inc. urge the Commission to deny SBC's Application for Provision of In-Region InterLATA Services in Arkansas and Missouri.

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Dated: October 4, 2001

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on October 4, 2001, I caused to be served upon the following individuals the Reply Comments of El Paso Networks, LLC and PacWest Telecomm, Inc. in CC Docket 01-194:

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